RECORD AND 1 BRIEFS.

No. 15-1248

Supreme Court, U.S.
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In The
Supreme Court of the United States

MCLANE COMPANY, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The EEOC's Brief in Opposition ("Opp.") to McLane's Petition confirms that this Court should issue the writ here. Since *EEOC v. Shell Oil*, 466 U.S. 54 (1984), the circuits have split on: (1) the standard for reviewing a district court's decision to enforce or quash an EEOC subpoena; and (2) how broadly to interpret relevance under *Shell Oil*. Both splits have enormous practical consequences for businesses and charging parties alike, and for the district courts that review EEOC subpoenas in the first instance. The EEOC's response underscores the peril in not granting the writ here.

The EEOC's response concerning the first issue – the acknowledged 8-1 split pitting the Ninth Circuit against most other courts of appeals – is entirely unavailing. The EEOC never disputes that the Ninth Circuit stands alone in applying a *de novo* standard of review to both the questions of law and fact involved in a district court's decision to enforce or quash an EEOC subpoena. The EEOC weakly attempts to recharacterize the district court order below as purely legal, when the opposite is true – the district court properly exercised its discretion to judge factual relevance in a subpoena. Empowering the Ninth Circuit to continue reviewing these issues *de novo* – as the EEOC suggests – would disrespect the superior competency of the district courts to determine these matters in the first instance. Worse yet, that approach builds in a far greater prospect of indefinite review that injures claimants. Consider that Ms. Ochoa

brought her charge in January 2008, and that the district court ruled on the EEOC's subpoenas in April 2012 and November 2012, only to have the Ninth Circuit review its ruling *de novo* and reverse it *in October 2015*. There are good reasons – grounded in district court expertise and efficiency for all – that eight other circuits defer to these rulings. Tellingly, the EEOC never defends the Ninth Circuit's aberrant standard on the merits, for there is nothing helpful about it.

The EEOC's wishful suggestion that McLane somehow waived this issue fails. The panel below was bound by longstanding Ninth Circuit precedent – as the panel below acknowledged – and McLane challenged that precedent at its first meaningful opportunity, seeking rehearing en banc. When it did, the Ninth Circuit unanimously declined to review the issue, making clear that neither that court, nor any panel of it, will fix this problem.

The Court should also grant the petition to resolve the split over the proper standard for relevance under *Shell Oil*. The Ninth Circuit applies a standard so broad it conflicts with *Shell Oil* and grants the EEOC nearly unlimited subpoena power, unmoored to the specific charge under investigation. The EEOC does not dispute the substantial importance of the issue. Instead, it argues that McLane is not really challenging the legal standard, but the application of that standard to the facts. McLane's petition refutes that argument – making clear that the problem is a relevance standard so capacious it cannot be squared with *Shell Oil*. Pet. 21-23. The disparate applications of

Shell Oil are not a function of case-specific facts, but circuit-specific notions of relevance that are intolerably divergent. The Ninth Circuit's capacious standard risks one jurisdiction dictating to many others the standard that will apply across the Nation, despite contrary law in the Fifth, Tenth, and Eleventh Circuits.

This Court should issue the writ to address both of these important conflicts.

ARGUMENT

I. THE EEOC ADMITS THAT THE NINTH CIRCUIT DEPARTS FROM EIGHT OTHER CIRCUITS ON THE STANDARD OF REVIEW OF DECISIONS CONCERNING THE ENFORCEMENT OF EEOC SUBPOENAS.

A. The EEOC Agrees That The Circuits Are Split, But Attempts To No Avail To Claim That This Case Doesn't Exemplify The Split, Based On The Incorrect Claim That The District Court Decision Presented Only Legal Issues.

The EEOC admits that, in applying a *de novo* standard of review to district court decisions regarding enforcement of agency administrative subpoenas, the Ninth Circuit stands apart from eight other circuits that review those decisions deferentially. Opp. 11. The EEOC, however, tries to avoid this Court's resolution of that clear circuit split by incorrectly claiming that the Ninth Circuit's decision below dealt only with legal

questions – which all circuits review *de novo*. Opp. 11-13. Thus, according to the EEOC's fractured syllogism, the Ninth Circuit's decision actually aligns with those of other circuits, and does not merit review.

That is very clearly wrong: there was no legal error here for the Ninth Circuit to review. The district court thought the "pedigree" information sought by the EEOC was *irrelevant*, and held as much. App. 28-30. If the Ninth Circuit really believed, as the government argues, that the district court made the relevance determination using the wrong legal standard, it would have remanded for consideration under the correct standard. *See, e.g.*, *Toyo Tire Holdings of Ams. Inc. v. Cont'l Tire N. Am., Inc.*, 609 F.3d 975, 982 (9th Cir. 2010).

But the Ninth Circuit did no such thing. The reason is simple – the Ninth Circuit's *de novo* review does not apply only to legal questions. Contrary to every other circuit that has considered the issue, the Ninth Circuit reviews what the government calls "the ultimate enforcement decision[]" *de novo*. Opp. 14. And that is exactly what it did here. The Ninth Circuit, in conflict with every other circuit, in essence acted as a district court. It applied the legal standard in the first instance to the cold record facts before it. As McLane's petition explained, this practice contradicts this Court's precedents on choosing the standards of review, and reflects an institutionally inappropriate lack of deference to the sound discretion of district courts. Pet. 16-20.

Moreover, had the Ninth Circuit applied a standard of review consistent with other circuits, as the EEOC insists it did, the Ninth Circuit would not have noted in its opinion the oddity of applying a *de novo* standard of review where other circuits apply a deferential standard. App. 8 n.3. Conspicuously absent from the Ninth Circuit's opinion is any suggestion that its decision would have come out the same way under either standard. By noting its anomalous standard of review, and failing to claim that it did not matter here, the panel decision recognized the need for – indeed, almost requested – the further review McLane seeks. *See* App. 8 n.3.

Importantly, caselaw the EEOC cites to suggest that the Ninth Circuit decision aligns with the other circuits actually proves the opposite. The EEOC relies on *Boehringer Ingelheim* to argue that the Ninth Circuit's application of its *de novo* standard in this case is really no different than any of the other circuits' "frameworks." Opp. 12 (citing *FTC v. Boehringer Ingelheim Pharm., Inc.*, 778 F.3d 142, 148 (D.C. Cir. 2015)). However, *Boehringer Ingelheim* shows how different the Ninth Circuit's standard really is, and thus, how mistaken the EEOC's analysis is.

In *Boehringer Ingelheim*, the D.C. Circuit stated that it reviews "a district court's decision to enforce an administrative subpoena for abuse of discretion," and that a "district court necessarily abuses its discretion if it applies the incorrect legal standard, a question that is reviewed *de novo*." 778 F.3d at 148. After finding that the district court applied the incorrect legal

standard, the D.C. Circuit *remanded the case* for the district court to exercise its discretion under the correct legal standard. *See id.* at 158.

If the Ninth Circuit's decision really was consistent with the other circuits' standards of review, then it would have remanded the case to allow the district court to exercise its discretion consistent with the Ninth Circuit's articulation of the legal standard. But the Ninth Circuit does not apply an abuse of discretion standard to subpoena enforcement cases like the D.C. Circuit. Instead, the Ninth Circuit did what no other circuit's standard of review would allow – it applied a *de novo* review to the "ultimate enforcement decision[]," (Opp. 14), which the EEOC never disputes is at least a mixed question of law *and* fact.

Boehringer Ingelheim thus underscores just how much the Ninth Circuit's *de novo* standard – which the EEOC never defends on the merits – diverges from those applied by other circuits. The EEOC's attempts to argue that the circuits are in harmony fail badly. Review is amply warranted.[1]

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[1] The EEOC (like the panel below) misreads *University of Pa. v. EEOC*, 493 U.S. 182 (1990), in arguing that it was legal error to equate necessity with relevance. In that case, this Court addressed a far different situation – whether a specific showing of particularized necessity was necessary to overcome a University's claim of privilege against disclosing information. *Id.* at 188.

B. The EEOC's Argument That McLane Waived The Standard Of Review Issue Fails Badly, As Does Its Suggestion That This Court Wait For The Ninth Circuit To Fix The Problem.

The EEOC's wishful argument that McLane "failed to preserve its standard of review argument" because the standard of review issue was "neither presented nor decided below" (Opp. 15) is badly mistaken. The EEOC's related suggestion that this Court should simply wait for the Ninth Circuit to correct its aberrant standard fares no better.

First, McLane presented its challenge to the standard of review at its first real opportunity to do so – seeking review en banc. In the Ninth Circuit, only an en banc panel can overrule circuit precedent, outside narrow exceptions not applicable here. *See, e.g.*, *United States v. King*, 122 F.3d 808, 810 (9th Cir. 1997). The Ninth Circuit's decision itself noted that its unique *de novo* standard "is now firmly entrenched in [Ninth Circuit] case law." App. 8 n.3 (collecting cases). Panel departure from that standard was an impossibility. In circumstances like these, the Ninth Circuit often reviews issues raised for the first time in a petition for rehearing en banc "when a solid wall of circuit authority," as was present here, would have rendered futile a party's attempt to raise the issue before the panel. *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1160 (9th Cir. 2014) (en banc) (citation omitted). Nothing was waived.

Second, the EEOC's assertion that McLane somehow "agree[d]" to the *de novo* standard in panel briefing is wrong, for all the same reasons. McLane simply identified the standard of review the panel was bound to apply. When McLane lost before the panel, it sought rehearing en banc – its first chance to litigate in the Ninth Circuit its disagreement with the standard. *See King*, 122 F.3d at 810.

Third, this record refutes the EEOC's speculation that the Ninth Circuit might correct this aberrant legal standard if left to its own devices. Opp. 14. Given "an appropriate opportunity to reconsider that standard," (Opp. 14) the Ninth Circuit resoundingly declined to do so. Not a single judge voted to take up the case and reconsider its *de novo* standard, despite Judge Watford pointing out its departure from other circuits' standards in the panel decision. App. 8 n.3. There is no reason to think the Ninth Circuit will later review this issue and correct itself, and good reason to think it will not. The EEOC's suggestion that this Court wait to review the issue lacks merit. The time for review is now.

II. THE NINTH CIRCUIT'S EXPANSIVE VIEW OF RELEVANCE IN 42 U.S.C. § 2000e-8(a) IRRECONCILABLY CONFLICTS WITH *SHELL OIL*, AND THE DECISIONS OF OTHER COURTS OF APPEALS.

A. The EEOC Has Not Refuted That The Ninth Circuit's Broad Notion Of Relevance Grants the EEOC Nearly Unlimited Authority, Which Conflicts With This Court's Guidance In *Shell Oil*.

The EEOC argues that McLane has not pointed to any error in the Ninth Circuit's "articulation of the applicable legal rule" and that McLane simply seeks review of the Ninth Circuit's application of the correct legal rule to the facts, which generally does not "warrant this Court's review." Opp. 16. Not so. McLane has already explained at length exactly how the Ninth Circuit's "notion of relevance is so broad that it cannot be squared with *Shell Oil*." Pet. 21.

In *Shell Oil*, this Court cautioned against an overly broad interpretation of "relevance" that would effectively eliminate Congress's limitation of the EEOC's "investigative authority." Pet. 21 (quoting *Shell Oil*, 466 U.S. at 72). This limitation serves an important purpose: to "cabin the EEOC's authority and prevent fishing expeditions." *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002) (citation and internal alterations omitted). Or as the Eleventh Circuit put it, "the EEOC may not enforce a subpoena in the investigation of an individual charge merely as an expedient bypass of the mechanisms required to file

a Commissioner's charge." *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 762 (11th Cir. 2014) (per curiam).

But, as explained in the petition, the Ninth Circuit's relevance standard fails to heed those cautionary notes. It is so broad it would "virtually always permit the EEOC to gather the personal identifying information of every employee of an investigated business – so long as the potential interviewees could conceivably 'cast light on the allegations against' the employer." Pet. 23 (citing App. 9-10). This understanding of relevance far exceeds the standard this Court articulated in *Shell Oil*.

Thus, contrary to the EEOC's assertion, McLane argued more than just a misapplication of the legal standard – it showed that the Ninth Circuit's relevance standard itself does not comport with *Shell Oil* – a conflict worthy of this Court's review.

B. The EEOC's Argument That There Is No Split Among The Circuits As To The Breadth Of Relevance Under *Shell Oil* Fails.

The EEOC acknowledges that circuits applying *Shell Oil*'s relevance standard have reached disparate results but argues that the divergence is just the result of the courts of appeals all applying the same relevance standard to different facts. Opp. 16-17. But as McLane demonstrated in its petition, the differing results were

caused by widely differing notions of relevance under *Shell Oil*, analysis the EEOC sidesteps. Pet. 24-27.

For example, in *Royal Caribbean Cruises*, Royal Caribbean refused to renew an HIV-positive employee's contract because of his medical condition, after which the employee alleged disability discrimination. 771 F.3d at 759. The EEOC then sought information on all individuals either not hired or fired for medical reasons. *Id.* The EEOC argued that this incredibly broad amount of information was relevant because it would help "uncover other potential violations" of the same type. *Id.* at 761. The Eleventh Circuit rejected that broad notion of relevance, finding that "[t]he relevance that is necessary to support a subpoena for the investigation of an individual charge is relevance to the contested issues that must be decided to resolve that charge." *Id.* at 763.

Other courts of appeals have likewise rejected the EEOC's attempt to stretch relevance beyond the bounds this Court laid out in *Shell Oil*. *See, e.g.*, *EEOC v. Burlington N. & Santa Fe R.R.*, 669 F.3d 1154, 1157-58 (10th Cir. 2012) ("Any act of discrimination could be part of a pattern or practice of discrimination, but not every charge of discrimination warrants a pattern or practice investigation."); *EEOC v. Packard Elec. Div.*, 569 F.2d 315, 316-18 (5th Cir. 1978) (affirming district court decision tailoring disclosure to charges rather than letting EEOC obtain "broad statistical information as to the respective employers' entire work force").

Key to this determination in every circuit but the Ninth are the facts actually alleged in the charge – in keeping with the statutory mandate. Otherwise, the EEOC could use virtually any charge to cast a broader net for information – and this case exemplifies that the danger is not just theoretical, but real. The Ninth Circuit's capacious relevancy standard (especially when coupled with its *de novo* review standard) permits the EEOC unfettered access to virtually everything that could conceivably fall within a claim. That wrong-headed approach conflicts with both the statutory structure and the EEOC's own enforcement mechanisms. *See Royal Caribbean Cruises*, 771 F.3d at 762.

This case exemplifies the problem. The panel took the original charge that McLane's nationwide "use of the strength test discriminates on the basis of sex" – a disparate *impact* charge – and allowed it to justify the EEOC's desire to "learn more about [employee and applicant] experiences" – information that would be pertinent to a disparate *treatment* charge. *See* App. 10. But untethering the subpoena request from the actual charge cannot be squared with 42 U.S.C. § 2000e-8(a), which limits the Commission's subpoena power to evidence "relevant to the charge under investigation."

And not only was a disparate treatment claim absent from the charge, but such a claim would also apply only to the location where an employee or applicant is treated in a disparate fashion. The EEOC could not have obtained the nationwide pedigree information at issue on a disparate treatment charge, a fact well understood by the district court. Despite this, the Ninth

Circuit gave the EEOC broad access to private information that should only have been available on a disparate impact charge (or if the EEOC had filed a Commissioner charge). *See* Donald R. Livingston, *EEOC Litigation and Charge Resolution* 243-44 (BNA 2005).

In sum, the Ninth Circuit's capacious notion of relevance departs significantly from the text of 42 U.S.C. § 2000e-8(a), this Court's elaboration of it in *Shell Oil*, and the decisions of other courts of appeals faithfully applying *Shell Oil*. As already explained in the petition (and not disputed by the EEOC), that divergence portends serious practical consequences for employers across the Nation. Pet. 26-30 (noting breadth and far-reaching impact of EEOC subpoenas); *Amicus* Br. 13-21 (highlighting disclosure and data-breach risks with furnishing the government with "voluminous confidential and sensitive data that have no relevance to the charge under investigation"); App. 16 (noting "government's dismal performance in protecting even its own employees' sensitive data") (Smith, J., concurring). This Court should grant review and resolve this split so the EEOC functions within the parameters set out by Congress in 42 U.S.C. § 2000e-8(a) and elaborated by this Court in *Shell Oil*.

CONCLUSION

For all these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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